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Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1043

THE CITY OF BLACK JACK,
A Municipal Corporation, *et al.*,

Petitioners,

—v.—

BARBARA BATES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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On Petition For A Writ of Certiorari To The
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For The Eighth Circuit

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STATUTE:

Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 et seq. passim

QUESTION PRESENTED

The City of Black Jack has violated Title VIII of the Civil Rights Act of 1968, and in so doing, has caused the demise of the Park View Heights project. The Eighth Circuit Court of Appeals has directed the District Court to supervise settlement negotiations and, if necessary, to enter injunctive relief aimed at redressing the loss of housing opportunity occasioned by the City's illegal and discriminatory conduct. In advance of any order entered against it, and with only the very general and unexceptional guidelines of the Court of Appeals to complain of, the City has sought the review of this Court.

Accordingly, claims about the actual relief which may be granted by the District Court are premature. The only question which presents itself for review at this point is whether, as the City of Black Jack maintains, any form of equitable redress levied against it would be inappropriate, notwithstanding the City's conceded violation of Title VIII of the Civil Rights Act of 1968 and the resulting loss of vital housing opportunity to the plaintiff class.

STATEMENT OF THE CASE

A fair picture of the instant controversy requires that petitioners' statement of the case be augmented in at least four respects.

First, the incorporation of the City of Black Jack and the enactment of Zoning Ordinance No. 12 were the culminating events in a campaign of local opposition to the construction of the Park View Heights project. Responding to uncontroverted evidence to this effect, the Eighth Circuit Court of Appeals has sketched this picture in some detail:

> "In 1969, the Inter Religious Center for Urban Affairs (ICUA) began planning Park View Heights to create alternative housing opportunities for persons of low and moderate income living in the ghetto areas of St. Louis. After a search for an appropriate site, ICUA settled on 11.9 acres on Old Jamestown Road, then in an unincorporated area, but now within the City of Black Jack.
>
> The site was designated for multiple-family structures. An option was obtained on the land, and in March, 1970, the sponsors filed a preliminary application with the Federal Housing Administration for initial approval of a proposed §236 development. The original plans envisioned 108 units comprised of two-story townhouses. Within a month, the proposal became a matter of public

> knowledge, and public opposition was swift and active.
>
> On June 5, 1970, HUD issued a 'feasibility letter,' which amounted to a green light for federal funding, and which was accompanied by a reservation of federal funds for the development. As stated in Park View Heights Corp. v. City of Black Jack, 467 F. 2d 1208, 1211 (8th Cir. 1972):
>
> > 'Upon learning of the "feasibility letter," area residents began a drive to incorporate the area including the site of the proposed Park View Heights apartments. On June 26, 1970, the Citizens for the Incorporation of Black Jack presented two petitions requesting incorporation...to the St. Louis County Council. Between June 26, 1970 and August 6, 1970, the St. Louis County Department of Planning reported to the St. Louis County Council that they "strongly opposed the act of incorporation on fiscal, planning, and legal grounds." Despite this opposition, the St. Louis County Council incorporated the City of Black Jack, Missouri, on

August 6, 1970.

> Between the date of the municipal incorporation and September 15, 1970, the municipal authority of the City of Black Jack was suspended by a Writ of Prohibition issued by a state court. Within six days after the writ was dissolved, the city Zoning Commission issued notices of hearings on a zoning ordinance...'

The ordinance was enacted by the City Council on October 20, 1970. It prohibited the construction of any new multiple-family dwellings and made present ones nonconforming uses." United States v. City of Black Jack, 508 F. 2d 1179, 1182-83 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975); See also Park View Heights Corp. v. City of Black Jack, 605 F. 2d 1033, 1035 (8th Cir. 1979) (App. B-2).*/

Second, racial discrimination permeated the campaign against the Park View Heights project at every turn. Contrary to the City's insistence that its conceded violation of Title VIII of the Civil Rights Act of 1968 was "unintentional," and its deeply misleading suggestion that the Eighth

*/ Appendices to the Petition for a Writ of Certiorari are cited as "App. ___."

Circuit concurs in this benign characterization of events (Pet. at 4, 5),*/ the evidence of illicit racial motivation presented to the Court of Appeals was uncontroverted and incontrovertible. In words twice deployed by unanimous panels of the Eighth Circuit:

> "Opposition to Park View Heights was repeatedly expressed in racial terms by persons whom the District Court found to be the leaders of the incorporation movement, by individuals circulating petitions, and by zoning commissioners themselves. Racial criticism of Park View Heights was made and cheered at public meetings. The uncontradicted evidence indicates that, at all levels of opposition, race played a significant role, both in the drive to incorporate and the decision to rezone." Park View Heights v. City of Black Jack, 605 F. 2d 1033, 1038, n. 4 (1979) (App. B-10n.4); United States v. City of Black Jack, 508 F. 2d at 1185, n. 3.

Third, the Court of Appeals has held: (a) that the attempt by the City Black Jack to zone out the Park View Heights project was a violation of Title VIII of the Civil Rights Act of 1968, and (b) that this conduct of the city caused the death of the Park View Heights project. Neither of these propositions is placed in dispute by the petitioners.

*/ Reference to the City's Petition for a Writ of Certiorari are cited as "Pet. at ___."

In United States v. City of Black Jack, supra, the Court of Appeals held that the City of Black Jack had violated Title VIII of the Civil Rights Act of 1968. The petitioners in the case at bar readily concede that they are bound by this holding. (Pet. at 5.) In the decision below, the Court of Appeals further held that the death of the project was the direct result of the City's illegal conduct:

> "...There can be no doubt that the failure of the Park View Heights project was a direct result of defendants' violation of the Fair Housing Act. The record reflects that in 1970 an option on the land had been acquired and the necessary federal preliminary approval, which included a set-aside of government funds sufficient to finance the projected cost of the project, had been obtained. United States v. City of Black Jack, 508 F. 2d 1182. At the trial, the general contractor for the project, Arthur Monsey, testified that by late 1970, he had arrived at a firm figure of $1,381,000 as the cost of the 108 unit project, was prepared to enter into a contract with the sponsor of the project at that price, and was ready to commence construction in late 1971. On the basis of this evidence, we think it clear that absent enactment of the discriminatory zoning ordinance, the project would

> have been constructed as planned." Park View Heights Corp. v. City of Black Jack, 605 F. 2d at 1038 (App. B-9 to B-10).

This finding of the Court of Appeals is not disputed by the petitioners, who introduced no evidence to the contrary at the trial below, and who stress in their petition before this Court that the question of causality is not at issue. See Pet. at 21-22.

Fourth, no injunction against the City has been issued by the District Court, and the Court of Appeals below has done no more than articulate a set of general guidelines (in the Court's own word, "comments") against the backdrop of which settlement negotiations between the parties should proceed, and any ultimate injunctive relief should be measured. See Park View Heights v. City of Black Jack, 605 F. 2d at 1040-41 (App. B-12 to B-14). The City is thus placed in the somewhat awkward position of conjuring up an injunction which might be issued against it (see Pet. at 12, n. 4 and text), and then asking this Court to anticipate and invalidate this figmental order.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THIS CASE PRESENTS NO ISSUE OVER WHICH THE COURT SHOULD EXTEND ITS DISCRETIONARY REVIEW. THE CLAIMS UPON WHICH THE CITY OF BLACK JACK IS FORCED TO RELY ARE ALTERNATIVELY PREMATURE OR FANCIFUL.

A. The objections of the City of Black Jack to the decision below reduce to the claim that the City will be subjected to unduly burdensome equitable relief at some point in the future or to the claim that no award of equitable relief against the City is appropriate.

This case has narrowed itself to a question of the propriety of an equitable remedy of undefined reach which may be imposed upon the City of Black Jack at some point in the future. That the City acted in violation of Title VIII of the Civil Rights Act of 1968 has been established. That its behavior was the cause of the demise of the Park View Heights Project is not now contested. The only remaining question is thus the ultimate responsibility of the City for the equitable redress of its illegal conduct. While the decision below plainly contemplates the possibility that the City of Black Jack may become the object of injunctive relief on behalf of the plaintiff class, it does so only in the most general of terms.

The Court of Appeals premised its decision upon an unexceptional and unobjectionable standard for the awarding of equitable relief against the City, borrowed directly from this Court's decision in Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-419 (1975):

> "Where racial discrimination is concerned,'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' Louisiana v. United States, 380 U.S. 145, 154 (1965). And where a legal injury is of an economic character,
>
> > '[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.' Wicker v. Hoppock, 6 Wall. 94, 99 (1867)."

See also International Brotherhood of Teamsters v. United States, 431 U.S. 324, 367 (1977). Franks v. Bowman Transportation Co. 424 U.S. 747, 763 (1976).

This invocation of a well-settled federal civil rights equitable tradition seems all but beyond dispute. Indeed, the City itself does not appear to take issue with the general application of this uncontroversial standard of relief.

It is unclear precisely on what grounds the City of Black Jack can or does object to the terms of so general and unprovocative a statement of its equitable obligation. Logically, however, the City's claim before this Court must reduce to one or both of these propositions: (1) the City will be required to bear an excessive and unfair burden as a result of the equitable relief to which it may be exposed, or (2) any equitable relief ordered against the City would be inappropriate.

The claim that the City will be asked to bear an excessive burden is simply and irreducibly premature. The claim that any equitable command to the City will be inappropriate is unsustainable. Each of these observations will be amplified briefly in the discussion which follows.

B. The claim that the City may be subjected to unduly burdensome equitable relief is premature.

In reversing the District Court's denial of relief, the Eighth Circuit did not fashion a specific and concrete decree, defining the precise nature of the City's equitable obligations. Rather the Court of Appeals remanded this matter to the trial court for further proceedings with the

ultimate goal of developing an appropriate remedial plan. In doing so, the Eighth Circuit's opinion suggests certain considerations that might be taken into account by the parties and by the trial court. But, at this interval in the litigative process, no concrete equitable decree has been fashioned or even shaped in broad outline.

The City is thus asking this Court to review a remedial plan that has not yet been developed and has not been given textual life as part of an equitable decree. Yet the City petitions this Court on the principal grounds that the kind of "affirmative" relief required of it by the Eighth Circuit's decision is prohibitively costly and unduly intrusive into its municipal affairs. There is, of course, no conceivable way for this Court to evaluate these claims in the abstract.

Under these circumstances, the extension of this Court's discretionary jurisdiction to these claims would be inappropriate. For in their present posture, petitioners' claims lack the concreteness and specificity which would allow the Court to render an informed judgment. As this Court noted in an analogous context: "Passing upon the possible significance of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case." Watson v. Buck 313 U.S. 387, 402 (1941).

C. The proposition that the federal courts suffer a constriction of their remedial authority when they are acting pursuant to civil rights legislation is unsupportable.

In an effort to provide a basis for its claim that no equitable redress can be demanded of it under Title VIII of the Civil Rights Act of 1968, the City advances a somewhat remarkable vision of the interplay of legislative and judicial authority. Under the City's view, when the federal courts fashion equitable remedies for constitutional violations they are free to order vigorous equitable relief against municipalities, but when specifically authorized to issue equitable relief for violations of congressionally defined civil rights, federal courts suffer a constriction of their power to act. See Pet. at 13-17. Such a view, of course, stands the traditional understanding of the play of federal legislative and judicial authority on its head. Pursuant to that understanding, the power of the federal judiciary to fashion remedies is most strained when the courts are forced to act without congressional direction or support. See, e.g., Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971); and Bell v. Hood, 327 U.S. 677 (1946). In contrast, the power of Congress to shape civil rights remedies is plenary and potent. See, e.g., Katzenbach v. Morgan, 384 U.S. 641 (1966); and Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

Not surprisingly, when the federal courts have found violations of federal civil rights statutes like Title VIII of the

Civil Rights Act of 1968, which authorize a broad range of relief, they have responded with great remedial vigour. See Franks v. Bowman Transportation Company, 424 U.S. 747 (1976); Albemarle Paper Company v. Moody, supra; Moore v. Townsend, 525 F. 2d 482 (7th Cir. 1975); United States v. West Peachtree Tenth Corp., 437 F. 2d 221 (5th Cir. 1971).

This vigour has been every bit as great where it is local governments which have acted in violation of Congress' civil rights enactments. See, Lau v. Nichols, 414 U.S. 563 (1974); Firefighters Institute v. City of St. Louis, 588 F. 2d 235 (8th Cir. 1978); cert. denied, ___U.S.___, 99 S. Ct. 3096 (1979); Resident Advisory Board v. Rizzo, 564 F. 2d 126 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978); United States v. City of Chicago, 549 F. 2d 405 (7th Cir.), cert. denied, 434 U.S. 875 (1977); Horry County v. United States, 449 F. Supp. 990 (D.D.C. 1978).

D. Black Jack's invocation of National League of Cities v. Usery lacks analytical foundation.

The City's reliance on National League of Cities v. Usery, 426 U.S. 833 (1976), is based on a line of argument which runs as follows: (1) Black Jack might eventually be required to alter its zoning laws in response to an injunction issued by the District Court; (2) one of the areas of traditional municipal authority is land use planning; and (3) therefore, such an injunction would violate the Usery prohibition. Even setting aside the utter prematurity of this claim, it is hard to

imagine a less hospitable set of circumstances for the invocation of the Usery doctrine.

By its terms, the Usery decision is restricted to exercises of Congress' commerce clause powers, while the case at bar concerns the enforcement of a civil rights enactment. See, e.g., 426 U.S. at 852, n. 17. Were Usery so easily transposed from commerce clause exercises of congressional authority to civil rights enactments, from plenary legislative standards to remedies for illegal discrimination, and from broad budget-implicating labor standards to narrow adjustments in ongoing municipal regulations, the case would provide an effective means of preventing Congress and the federal courts from authorizing any civil rights remedies at all. Conferring such breadth on the Usery principle is analytically unsupportable.

II

THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF THIS COURT OR THOSE OF ANY COURTS OF APPEALS.

In an effort to demonstrate that the imposition of anticipated equitable relief upon the City of Black Jack places the court below in conflict with the decisions of this Court and at least one decision of the Sixth Circuit Court of Appeals, the City seizes upon a phrase first used by this Court in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). In Swann, this Court stated that "the power of a district court to grant affirmative injunctive relief against a State or its subdivision is limited to cases in which a constitutional violation is established." 402 U.S. at 16. This language was subsequently repeated in other decisions of this Court, and in a decision of the Sixth Circuit Court of Appeals. See Hills v. Gautreaux, 425 U.S. 284 (1976). Milliken v. Bradley, 418 U.S. 717 (1974); Rizzo v. Goode, 423 U.S. 362 (1976); and Garrett v. City of Hamtramck, 503 F. 2d 1236 (6th Cir. 1974).

The City's reliance on this language takes it badly out of context. In Swann this Court was merely indicating that the federal courts could issue equitable relief in school desegregation cases only after establishing the existence of unlawful conduct; and, since no independent statutory civil rights claim was involved, it was natural but without significance that this Court spoke in terms of the Constitution.

See 402 U.S. at 16.

Likewise, in Milliken, Gautreaux, and Rizzo, this Court was stressing that municipalities or municipal officials could be made subject to equitable remedies only upon a finding that these entities or officials were themselves guilty of illegal conduct. The nature of the claims in those cases made it natural for the Court to reiterate the language of Swann, but again, the choice of words was without the significance which the City of Black Jack chooses to read into it. Finally, in Garrett v. City of Hamtramck, supra, the Sixth Circuit Court of Appeals cited the statement from Swann, in dicta, to underscore the serious constitutional violation upon which the case actually turned and for which relief was being authorized. In the Hamtramck case, a case filled with a welter of legal claims, including state law claims erroneously heard as an extension of the District Court's pendent jurisdiction, the Sixth Circuit quoted from Swann merely to stress the centrality of the federal constitutional issue. See 503 F. 2d at 1246-47.

In sum, the proposition for which petitioners cite Swann, Milliken, Gautreaux, Rizzo, and Hamtramck--that the equitable authority of the federal courts is drastically curtailed when remedying violations of statutory, as opposed to constitutional proscriptions--was neither raised nor addressed in any of those cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari, in the above-styled matter, should be denied.

Respectfully submitted,

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